

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

GEORGE E. DULIN  
Plaintiff

V.

NO. 3:96CV15-B-A

DOVER ELEVATOR COMPANY  
Defendant

**MEMORANDUM OPINION**

This cause comes before the court upon the defendant's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

**FACTS**

The plaintiff was employed by the defendant, Dover Elevator, as a Construction Superintendent II. His primary duty was to supervise the construction crews within the defendant's Memphis, Tennessee, district. The plaintiff was sixty years of age when the defendant terminated his employment on September 22, 1994.

The plaintiff asserts that he was one of the oldest employees in the Memphis construction division, and was paid one of the highest salaries. He had worked for the defendant for twenty-seven years and had an exemplary record. The plaintiff contends that his termination was the result of age discrimination, in that he was replaced by a younger person.

The defendant maintains that the Memphis district construction division began to lose substantial amounts of money in 1990,

causing the defendant to implement a series of cost cutting measures. When the losses continued, the defendant allegedly eliminated the Construction Superintendent II position, and divided the plaintiff's duties between the district manager, Ken Donner, and the New Equipment Sales Manager, George Robbins. The defendant asserts that there has been no Construction Superintendent II in its Memphis district since the plaintiff was terminated in September of 1994.

#### **LAW**

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry

of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

In order to establish a prima facie case of age discrimination, the plaintiff must offer evidence that: (1) he was discharged; (b) he was qualified for the position; (3) he was within the protected class; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of his age. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993). If the plaintiff meets these requirements, a presumption of discrimination arises which the defendant must then rebut by articulating a legitimate, non-discriminatory reason for the discharge. Id. Once the employer has articulated a legitimate, non-discriminatory reason for its actions, the presumption dissolves, and the plaintiff must come forward with evidence that the proffered reason is a pretext for discrimination. Id. If the plaintiff fails to offer evidence from which a jury could reasonably conclude that the defendant's articulated reason is a

pretext for discrimination, summary judgment is appropriate. Id. at 957-959.

The defendant concedes that the plaintiff has met the first three elements of the prima facie case. However, the defendant contends that the plaintiff was not replaced, as his position was eliminated and his duties were divided among other employees. The court concurs. A person is not replaced when another employee is assigned to perform the plaintiff's duties or when work is redistributed among other existing employees. Smith v. Morse & Co., 76 F.3d 413, 423 (1st Cir. 1996); Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir. 1990), cert. denied, 498 U.S. 878, 112 L. Ed. 2d 171 (1990). The plaintiff has failed to offer sufficient evidence from which a reasonable person could conclude that the plaintiff was replaced, as opposed to the plaintiff's position being eliminated and his duties redistributed.

Without evidence that he was replaced by a younger person, the plaintiff must show that he was otherwise discharged because of his age. The plaintiff's only other evidence of age discrimination is his own subjective belief that age was a determining factor in his termination. A subjective belief of discrimination, however genuine, is not sufficient to create a jury issue when the employer articulates a legitimate, non-discriminatory reason for the discharge. Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 119

(5th Cir. 1993). Therefore, the court finds that the plaintiff has failed to meet the requirements of a prima facie case.

Even if the court were to find that the plaintiff had met the initial prima facie case, the defendant has proffered a legitimate, non-discriminatory reason for the plaintiff's discharge. The defendant has asserted that the plaintiff's job was eliminated due to losses within the construction division, after several other cost-cutting measures had failed. It is well-settled that job elimination is a sufficient, non-discriminatory reason for discharge. Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 150 (5th Cir. 1995), cert. denied, 133 L. Ed. 2d 664 (1996); Bodenheimer, 5 F.3d at 957-958. The plaintiff has failed to offer any evidence from which a jury could reasonably conclude that the defendant's proffered reason is a pretext for age discrimination.

#### **CONCLUSION**

For the foregoing reasons, the court finds that the defendant's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the \_\_\_\_\_ day of February, 1997.

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NEAL B. BIGGERS, JR.  
UNITED STATES DISTRICT JUDGE